Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 14 1996
Federal Communications Commission
Office of Secretary

In the Matter of

Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	))))	GC Docket No. 96-55

COMMENTS OF
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in response to the Notice of Inquiry and Notice of Proposed Rulemaking ("Notice') in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving over 80 percent of the nation's cable households and over 100 cable program networks.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission intends to review its practices and policies concerning the treatment of confidential information provided to the agency by regulated entities and others. It proposes to adopt general guidelines for the "persuasive showing" standard applied to disclosure requests, a model protective order for the conditional disclosure of documents, and guidelines for

substantiating confidentiality claims.[1] The Commission wishes "to avoid unnecessary competitive harm that could be caused by the disclosures of such information and still fulfill [its] regulatory duties in a manner that is efficient and fair to the parties and members of the public."[2]

The NPRM largely addresses the need for more uniform confidentiality rules in the context of common carrier proceedings. However, the Commission is faced with a whole different set of confidentiality concerns in the video programming market. The competitively sensitive nature of programming contracts and the overall impact that disclosure has on market competition must come into play in analyzing FCC policies. NCTA believes that cable programming contracts should be presumptively confidential, and that the burden should be on the requesting party to demonstrate a compelling reason to disclose proprietary information to the public. Moreover, given the divergent contexts in which programming contract issues arise, the Commission should not adopt universal confidentiality rules. Rather, it should retain the flexibility to tailor confidentiality requirements to the facts before it, to prevent overly broad disclosure requests, and to prevent abuse of its regulatory processes.

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1 NPRM at ¶¶ 32, 36, 56.

2 Id. at ¶ 1.

DISCUSSION

I. THE COMMISSION SHOULD APPLY THE PRESUMPTION THAT VIDEO PROGRAMMING CONTRACTS ARE CONFIDENTIAL AND SHOULD MAINTAIN A FLEXIBLE APPROACH TO ITS CONFIDENTIALITY RULES

A. Presumption of Confidentiality

The NPRM proposes to replace the current case-by-case balancing approach with precise standards that would apply to all future confidentiality requests. The need for revised disclosure policies is almost entirely focused, however, on the common carrier context (e.g. tariff, formal complaint and audit proceedings).[3] It largely overlooks a whole area of the communications industry: the video programming marketplace.

Programming affiliation agreements -- whose rates, terms and conditions vary widely depending on a range of non-regulated market factors -- contain confidential proprietary information that is critical to the everyday operation of the cable television business. Increasing access to this sensitive business information could fundamentally alter the manner in which cable operators deal with suppliers and the way programmers deal with distributors.

In the highly competitive video programming market, a competitor's ability to glean knowledge of the overall structure of another distributor's contracts with different parties and the pattern of concessions in particular provisions is likely to

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[3] See id. at ¶¶3-29. The Notice only mentions that cable operators may provide proprietary information as part of a special relief request, but does not discuss the application of the confidentiality rules to cable television.

adversely affect the health of the entire programming market. For example, third parties may attempt to use sensitive pricing information to gain an unfair competitive advantage against their rivals or improperly influence negotiations between suppliers and distributors. Such disclosure would also inhibit future negotiations between programmers and affiliates. The Commission recognized in the NPRM that the desire of parties to protect confidential and proprietary information is consistent with promoting robust competition.[4]

This is not a new concern. The Commission has previously found that disclosure of contractual arrangements between satellite carriers and home satellite dish ("HSD") distributors would likely cause substantial competitive harm to the subject carriers. Therefore, it protected the contracts from disclosure under Exemption 4 of the Freedom of Information Act ("FOIA").[5] In noting that many different entities in addition to the subject carriers provide HSD distribution services, the Commission said:

> [D]isclosure of the contracts could result in substantial competitive harm. Release of the contracts at issue would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carriers' negotiating posture with HSD distributors and might

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[4] Id. at ¶ 30.

[5] National Rural Telephone Cooperative Request for Inspection of Records, FOIA Control No. 89-130, Memorandum Opinion and Order, released January 19, 1990. Exemption 4 under FOIA authorizes the Commission to withhold from public disclosure trade secrets as well as confidential commercial or financial information.

> disrupt the carriers' business relationship with HSD distributors currently under contract with the carriers.[6]

Similarly, release of cable programming contracts could adversely affect the operators and programmers competitive posture with respect to other multichannel distributors and other program networks.

In light of these concerns, NCTA believes that programming contracts should be presumptively confidential. As the Commission points out in the NPRM, its current confidentiality rules contain a list of categories of materials that are not routinely available for public inspection and, therefore, do not require a request for confidential treatment.[7] We believe that the current list should be expanded to include contracts between multichannel video distributors and program networks. Such agreements would be automatically accorded confidential treatment, putting the burden on the requesting party to make a compelling showing that it is in the public interest to disclose the subject material

B. Flexibility in Confidentiality Rules

The need to maintain the confidentiality of programming agreements between cable operators and program networks arises in a variety of FCC proceedings: program access disputes;[8] disputes over rates for multiple dwelling

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[6] Id. at ¶ 12. The Commission also rejected NRTC's argument that public interest grounds for disclosure overrode the applicability of Exemption 4

[7] 47 C.F.R. § 0.457(d).

[8] Id. § 1003 (h).

units;[9] rate proceedings;[10] social contract negotiations;[11] and leased access disputes.[12] The Commission has consistently recognized that the proprietary information in these documents warrants some form of confidentiality protection.

For example, in the social contract context, the Commission determined that "disclosure would undermine the process which the [social contract method] was designed to encourage" and therefore found that its obligation to protect confidential information was greater than it might be in other instances.[13] Similarly, in program access disputes, while the Commission determined that some programming contracts may have to be provided for the proper evaluation of complaints,[14] it expressed the need to protect proprietary information from disclosure due to its "competitively sensitive nature."[15] Thus, the Commission adopted confidentiality procedures specifically designed to restrict access to

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9 47 U.S.C. § 543 (d) (prohibiting "predatory" discounts to multiple dwelling units).

10 See Third Order on Reconsideration, Rate Regulation, 9 F.C.C.R. 4316, ¶¶ 77-79 (1994).

11 Social Contract for Continental Cablevision, FCC 95-335, ¶ 3, n.7 (released August 3, 1995) ("Continental Social Contract Order").

12 47 C.F.R. § 76.975(e).

13 Continental Social Contract Order at ¶ 3, n.7.

14 See 47 C.F.R. § 1003 (h). While these rules create certain independent and separate standards for the treatment of confidential information submitted in program access disputes, the rules nonetheless rely on many of the standards established by the Commission's general confidentiality rules.

documents given the unique issues raised in the program access context.[16] Recently, the Commission reiterated the need to guard against disclosure of confidential information in the video programming context when it determined that "it is unnecessary and undesirable" for "open video system operators to disclose their carriage contracts."[17]

Given the various regulatory contexts in which programming confidentiality issues arise, the Commission's confidentiality rules should be flexible. First, as noted above, imprudent exposure of programming contracts and other cost information in the highly competitive video programming business might allow parties obtaining such information to set prices in a manner that injures cable

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15 Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration, 10 F.C.C.R. 1902, ¶ 71 (1994).

16 Id. at ¶¶ 63-71. The Commission recognized that given the "competitively sensitive nature" of programming contracts, there may be situations where it is necessary to restrict access to a party's proprietary information to a smaller group of individuals than currently provided under the rules. It decided to amend its rules to handle such requests on a case-by-case basis. See also Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 F.C.C.R. 3359, ¶ 78, n. 103 (1993); Petitions for Reconsideration of Discovery Communications, Liberty Media, Viacom. Inc. in Docket No. 92-265

17 Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, ¶ 132 (released June 3, 1996). In cable rate proceedings, the determination of whether certain proprietary information must be disclosed to local franchising authorities (LFAs) is made through joint consideration of (1) the relevance of the information requested, (2) its proprietary nature, and (3) the protection from disclosure to outside parties the LFA is willing to provide. See Third Order on Reconsideration, Rate Regulation, supra at ¶¶ 77-79 (1994). The Cable Bureau declined to adopt a series of proposals designed to enable cable operators to request external programming cost pass throughs without being required to provide confidential programming contracts to LFAs. The Bureau recognized, however, that while franchising authorities may request information that is "reasonably necessary" to their rate-setting function, "confidential programming contracts may contain a substantial amount of information that does not meet that standard, the production of which would unnecessarily risk the disclosure of sensitive business information." Letter from Meredith Jones, Chief, Cable Services Bureau to Wesley Heppler and Paul Glist, Cole Raywid & Braverman, May 26, 1995.

operators and programmers and reduces consumer welfare by diminishing competition.

Second, disclosure of sensitive information concerning price and other terms would prejudice the ability of suppliers and distributors to conduct good faith, arms length negotiations. This, too, would reduce the overall competitiveness of the market. An "across-the-board" application of confidentiality rules which were designed to accommodate common carrier interests and which do not consider the unique circumstances of the cable industry would seriously harm the ability of video programmers and video programming distributors to stay competitive.[18]

In addition, a rigid set of disclosure standards for all regulatory contexts would deprive the Commission of the necessary flexibility to settle and resolve cases between parties privately, without the need for extended and costly regulatory proceedings. Both in and out of the cable context, the Commission has employed alternative regulatory measures such as settlement proceedings and social contracts with increasing frequency and with success.[19] Indeed, cable social

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[18] Moreover, the 1996 Act places an affirmative responsibility on the Commission to "promote competition and reduce[ ] regulation" in the cable industry (H.R. Rep. No. 204, 104th Cong., 1st Sess. 47 (1995) ("House Report")) in order to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies." (S. Conf. Rep. No. 230, 104th Cong., 2d Sess. at cover page (1996) ("Conference Report")). As Congress stated: "there is a need to...deregulate the industry...and rel[y] instead on the development of marketplace forces." (House Report at 54.) See also 47 U.S.C. §521(6) (goal of Title VI is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.") Endangering the level of competition in the cable industry by applying unwarranted confidentiality standards would be antithetical to these goals.

[19] See New York State Department of Law v. F.C.C., 984 F.2d 1209 (D.C. Cir. 1993). See also Continental Social Contract Order; Social Contract for Time Warner, FCC 95-478 (released November 30, 1995).

contracts have been instrumental in providing the rate stability and upgrade commitments[20] necessary for the rapid deployment of advanced telecommunications technology. In recognition of these advantages, Congress specifically authorized the Commission to continue employing such alternative forms of regulation.[21] As noted above, the ability to keep sensitive negotiations between parties confidential is crucial to the success of any such methods.

Therefore, the Commission should not adopt a "one size fits all" confidentiality regime. The Commission should continue to follow the courts, by fashioning confidentiality requirements reflecting the needs and interests of the parties involved and the public interest.

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[20] For example, the Continental and Time Warner Social Contracts have secured substantial upgrade commitments for over 20 percent of all cable subscribers. See Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996. See also id.

[21] See 1996 Act, § 706 (authorizing the Commission to exercise alternative regulation and regulatory forbearance in order to encourage the deployment of advanced telecommunications technologies).

CONCLUSION

For the foregoing reasons, the Commission should not adopt universal confidentiality rules. Given the special status of programming agreements in a competitive video marketplace, the Commission should apply a presumption of confidentiality to such documents and maintain flexibility in applying its disclosure rules.

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June 14, 1996